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No. 90-1227

In The

Supreme Court of the United States

October Term, 1990

RICHARD A. DELGAUDIO, *et al.*,

Petitioners,

v.

BENJAMIN N. A. KENDRICK, JUDGE, CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

MARY SUE TERRY
Attorney General of Virginia

GAIL STARLING MARSHALL
Deputy Attorney General

WILLIAM H. HAUSER
Senior Assistant Attorney General

*W. MARK DUNN
Assistant Attorney General

Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-0081
**Counsel of Record for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THIS COURT LACKS JURISDICTION TO REVIEW THIS CASE FOR EACH OF SEVERAL JURISDICTIONAL DEFICIENCIES 3

A. Petitioners Failed to Raise A Federal Issue in State Court 3

B. The Judgment Below is Based on Independent and Adequate State Grounds 4

C. The Judgment Complained of is Not Final ... 5

II. JUDICIAL DISQUALIFICATION FOR PERSONAL BIAS IS NOT A CONSTITUTIONAL ISSUE 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 4, 6, 7

Cardinale v. Louisiana, 394 U.S. 437 (1969) 3

Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) 5

Herb v. Pitcairn, 324 U.S. 117 (1945) 4

In re Johnston, 3 Va. App. 492, 350 S.E.2d 681 (1986) 2

Market Street R. Co. v. Railroad Commission, 324 U.S. 548 (1945) 5

Supervisors of Bedford v. Wingfield, 68 Va. 329 (1876) 2

Tumey v. Ohio, 273 U.S. 510 (1927) 6

Va. Dept. Corrections v. Crowley, 227 Va. 254, 316 S.E.2d 439 (1984) 6

STATUTES

28 U.S.C. § 1257(a) 1, 5

MISCELLANEOUS

Canon 3(C) (a) of the Cannons of Judicial Conduct for the State of Virginia 2, 3, 4

JURISDICTION

The petition for a writ of certiorari invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). However, jurisdiction is deficient for each of the following reasons: the petitioners failed to raise a federal question in the state court (*see* Argument 1A below); the judgment below rests on independent and adequate state grounds (*see* Argument 1B below); and the judgment sought to be reviewed is not final (*see* Argument 1C below).

STATEMENT OF THE CASE

The judgment sought to be reviewed in this case is a denial of a petition for a writ of prohibition by the Virginia Supreme Court. The prohibition petition requested the recusal of a state trial judge for personal bias.

Philip J. Hirschkop, a prominent activist, filed a lawsuit against Richard A. Delgaudio, Cynthia K. Delgaudio, and Richard A. Delgaudio & Associates, Inc. (the petitioners in this case), as well as other defendants, in the Circuit Court of Alexandria, Virginia. The lawsuit sought damages for defamation and related tortious misconduct resulting from a conservative fundraising campaign. The fundraising literature at issue associates Hirschkop with the National Lawyers Guild.

The Virginia Supreme Court appointed Judge Benjamin N. A. Kendrick of the Circuit Court of Arlington County, Virginia (the respondent in this case) to hear the case upon recusal of the local judges. Petitioners filed a motion to recuse Judge Kendrick in the trial court which

invoked Canon 3(C) (a) of the Canons of Judicial Conduct for the State of Virginia.[1] Petitioners asked Judge Kendrick to disqualify himself for these reasons: Judge Kendrick had served as a law clerk in Hirschkop's firm some twenty years previously; Judge Kendrick and Hirschkop were "social colleagues"; and Judge Kendrick and Hirschkop were both listed in the 1973 National Lawyers Guild Referral Directory.

A hearing on petitioners' motion to recuse was held in the trial court. Hirschkop made unchallenged assertions that Judge Kendrick's clerkship was limited to one summer on an unpaid basis. Hirschkop further stated that his social contact with Judge Kendrick was limited to approximately two or three chance meetings per year, and that on one occasion he was given tea at the judge's house when dropping off some papers. Judge Kendrick remarked during the course of the hearing that he did not remember the circumstances of the listing in the National Lawyers Guild Directory. Upon consideration of briefs and argument, Judge Kendrick denied the recusal motion.

Petitioners next filed a petition for a writ of prohibition[2] in the Virginia Supreme Court which sought Judge

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[1] "A judge should disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Part 6, § III, Canon 3(C) (a) of the Rules of the Supreme Court of Virginia.

[2] Under Virginia law, a writ of prohibition is a prerogative writ granted only "with great caution and forebearance" upon the exercise of "sound judicial discretion" in cases of "extreme necessity." *See In re Johnston*, 3 Va. App. 492, 495-496, 350 S.E.2d 681, 683 (1986) (quoting *Supervisors of Bedford v. Wingfield*, 68 Va. 329, 333 (1876)).

Kendrick's disqualification. The petitioners again invoked Canon 3(C) (a) of the Canons of Judicial Conduct for the State of Virginia. The petitioners reiterated the same grounds for disqualification urged in the trial court. The Attorney General of the Commonwealth of Virginia filed a demurrer and motion to dismiss on behalf of Judge Kendrick. The Virginia Supreme Court summarily dismissed the petition, which prompted the instant petition for a writ of certiorari to this Court.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION TO REVIEW THIS CASE FOR EACH OF SEVERAL JURISDICTIONAL DEFICIENCIES

A. Petitioners Failed to Raise A Federal Issue in State Court

This Court lacks jurisdiction because petitioners failed to raise a federal question in the state court proceedings. In *Cardinale v. Louisiana*, 394 U.S. 437 (1969), this Court stated that "[i]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." 394 U.S. at 438.

In this case, petitioners raise the federal constitutional due process argument for the first time in this Court. The disqualification issue was framed as a violation of a canon of judicial conduct (a state rule of court) in both the recusal motion heard in the trial court and in the prohibition petition to the Virginia Supreme Court. The prospect of violation of constitutional due process

was raised in neither state forum. Moreover, the decisions of both the trial court and the Virginia Supreme Court are not based on federal authority. Therefore, this petition for a writ of certiorari must be denied for failure to raise a federal issue in the state court.

Conceding that a due process argument was not explicitly raised below, petitioners argue that their contention in state court that recusal was mandated by Canon 3(C) (a) of the Canons of Judicial Conduct is the "equivalent to the standard of due process." Pet. 14. However, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court explicitly stated that a claimed violation of a judicial conduct canon proscribing personal bias is not the equivalent of a constitutional due process argument. 475 U.S. at 820.

B. The Judgment Below is Based on Independent and Adequate State Grounds

This Court lacks jurisdiction in this case because the judgment complained of rests upon independent and adequate state grounds. It is axiomatic that this Court is without jurisdiction to review a state decision based upon an independent and adequate state ground. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

In this case, Judge Kendrick filed a demurrer and motion to dismiss in response to the petition for a writ of prohibition. The demurrer was based on the following grounds: a writ of prohibition is not a proper remedy for judicial recusal under Virginia law; the facts alleged do not warrant the discretionary exercise of an exceptional, prerogative writ under Virginia law; and the facts alleged

do not constitute violation of any applicable state canon of judicial conduct. The Virginia Supreme Court dismissed the petition upon consideration of respondent's demurrer. Because each and every defense put forward in the demurrer is a matter of state law, this petition for a writ of certiorari must be denied because the judgment below rests on independent and adequate state grounds.

C. The Judgment Complained of is Not Final

This Court lacks jurisdiction because the denial of the prohibition writ is not a "final" judgment as contemplated by 28 U.S.C. § 1257(a). The general rule is that, to be reviewable, the state court judgment "must be subject to no further review or correction in any other state tribunal; it also must be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945).

In this case, the denial of the prohibition writ is an interlocutory step in the underlying defamation action. The anticipated trial of the defamation suit constitutes further proceedings on the merits which precludes finality. Moreover, the issue of Judge Kendrick's recusal is reviewable on appeal upon completion of the defamation action. In sum, this petition for a writ of certiorari must be denied because the judgment complained of is not "final."

Petitioners contend that the judgment sought to be reviewed is "final" under the authority of *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975). Pet. 3. Specifically, petitioners rely on the third category of cases recognized in

Cox in which "if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481. However, *Cox* is inapposite to this case because a denial of a prohibition writ which does not explicitly reach the merits is not a bar to subsequent appellate review. *Va. Dept. Corrections v. Crowley*, 227 Va. 254, 262, 316 S.E.2d 439, 443 (1984). The Virginia Supreme Court dismissed the prohibition petition upon consideration of respondent's demurrer without reaching the merits. Therefore, res judicata and collateral estoppel will not bar review of the recusal issue on appeal, thereby removing this case from the definition of finality announced in *Cox*.

II. JUDICIAL DISQUALIFICATION FOR PERSONAL BIAS IS NOT A CONSTITUTIONAL ISSUE

The petition for a writ of certiorari must be dismissed because the record in this case is devoid of an intimation of a due process violation. In *Aetna Life Insurance Co. v. Lavoie*, this Court stated:

> The Court has recognized that not '[a]ll questions of judicial qualification . . . involve constitutional validity. Thus, matters of kinship, *personal bias*, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.'

475 U.S. at 820 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)) (emphasis added).

In this case, the crux of petitioners' argument is the perceived personal bias of Judge Kendrick. However, as

recognized by this Court in *Aetna Life Insurance*, allegations of personal bias in judicial disqualification cases do not reach the stature of a constitutional issue. 475 U.S. at 820. Therefore, this petition for a writ of certiorari must be denied.

CONCLUSION

For these reasons, Benjamin N. A. Kendrick, Judge, Circuit Court of Arlington County, Virginia, respondent herein, prays that the petition for a writ of certiorari will be denied.

Respectfully submitted,

BENJAMIN N. A. KENDRICK, Judge,
Circuit Court of Arlington
County, Virginia

MARY SUE TERRY
Attorney General of Virginia

GAIL STARLING MARSHALL
Deputy Attorney General

WILLIAM H. HAUSER
Senior Assistant Attorney General

*W. MARK DUNN
Assistant Attorney General

Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-0081
*Counsel of Record for Respondent